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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

HARVIE SMITH,

Defendant and Appellant.

D071956

(Super. Ct. No. SCN342422)

APPEAL from an order of the Superior Court of San Diego County, Sim Von Kalinowski, Judge. Affirmed.

Christine M. Aros, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Tami Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

The court found Harvie Smith guilty of fraudulent appropriation by an employee (Pen. Code, § 508; count 1).¹ The court stayed Smith's sentence pending successful

¹ All statutory references are to the Penal Code unless otherwise specified.

completion of probation. On appeal, Smith contends the following probation conditions are unconstitutional: defendant shall obtain probation officer's (P.O.) consent before leaving San Diego County (condition 6l); defendant shall obtain P.O. approval as to residence (condition 10g); and defendant shall submit computers and recordable media to search at any time with or without a warrant, and with or without reasonable cause, when required by P.O. or law enforcement officer (condition 6n). The attachment to condition 6n specifies "computers and electronic and wireless communication devices . . . including any form of written communication (email, text message, twitter, or similar), web browser history, or photographs" are subject to search. We conclude Smith forfeited his right to challenge the conditions by failing to object in the court below. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Michael McLaughlin hired Smith to be the on-site property manager for Parkside Villa Apartments in Oceanside around 2004. Smith's duties included collecting rents, entering rent payments into the computer system, making bank deposits, and documenting all financial statements. McLaughlin considered Smith's work performance to be excellent until 2012. In 2012, the computer system's hard drive crashed and McLaughlin went through all physical financial documents to recreate the computer records. During this process, McLaughlin noticed numbers were not adding up. Specifically, McLaughlin noticed about \$80,000 of rent payments that were never deposited to the bank. McLaughlin asked Smith about the missing payments and Smith

confessed to stealing the money because he was in gambling trouble. McLaughlin did not fire Smith but decided to give him another chance.

Then, in October 2014, McLaughlin again noticed missing bank deposits. McLaughlin compared the rental payments and bank deposits for each month from January to October 2014 and found around \$60,000 unaccounted for. McLaughlin went straight to the police.

A few days later, police officer Randy Markham met with Smith at the apartment complex. Smith admitted to gambling and stealing some of the 2014 rental payments. Then, Smith drove himself to the Oceanside Police Department where he met with Officer Matthew Lyons. During this meeting, Smith admitted to and identified the 2014 rental payments he had stolen.

The court found Smith guilty of (1) fraudulent appropriation by an employee, (2) grand theft by an employee, and (3) grand theft of personal property. The court struck counts 2 and 3 and Smith's sentence was suspended pending successful completion of probation.

DISCUSSION

I

STANDARD OF REVIEW

A probation condition is reviewed for abuse of discretion. (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) "Generally, '[a] probation condition will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct

which is not reasonably related to future criminality." ' ' ' (Ibid., quoting *People v. Lent* (1975) 15 Cal.3d 481, 486.)

II

Smith asserts the following probation conditions are unconstitutional: approval to leave San Diego County, approval as to residence, and warrantless searches of his electronic devices. Smith contends the conditions can be challenged for the first time on appeal because he presents facial challenges to the constitutionality of the conditions.

Failure to object to a probation condition at the trial court level forfeits the right to challenge the condition on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 237.)

However, facial challenges to the constitutionality of probation conditions that present pure questions of law may be raised for the first time on appeal. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887-889 (*Sheena K.*).)

Smith relies on *Sheena K.* to avoid forfeiture. In *Sheena K.*, the California Supreme Court held that a constitutional challenge to a probation condition *can* "present a pure question of law" and withstand failure to object below. (*Sheena K.*, *supra*, 40 Cal.4th at p. 887). The Court noted that its holding does not apply to all constitutional challenges, " 'since there may be circumstances that do not present "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." ' ' ' (*Id.* at p. 889.) Further, *Sheena K.* emphasized that objections to facial constitutional flaws should generally, given the opportunity, be objected to in the trial court. (*Ibid.*)

Smith objects to the conditions requiring him to obtain consent before leaving San Diego County and approval as to his residence as unconstitutionally vague and overbroad because the conditions are not narrowly tailored to further a compelling state interest.² We disagree.

In an overbreadth challenge, "[t]he essential question . . . is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights--bearing in mind . . . practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.) When a condition limits a person's constitutional rights the condition "must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

The conditions requiring approval before leaving San Diego County and approval as to residence are not unconstitutional on their face. There are circumstances where the state has legitimate interests to infringe upon constitutional rights of travel and association. For example, in *People v. Stapleton* (2017) 9 Cal.App.5th 989, a residency condition was upheld because the condition aided probationer's rehabilitation. (*Id.* at p. 996.) Thus, *Stapleton* illustrates under some circumstances a residency condition is proper. Here, an analysis of the relationship of the conditions to the state's interests requires looking to the facts of this case. According to *Sheena K.*, such a factual analysis is best reserved for the trial court to " 'encourage development of the record and a proper

² Appellant's opening brief states once that the conditions are unconstitutionally vague. The burden is on the appellant to prove error. (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1600.) One statement contending the probation conditions are unconstitutionally vague, without anything more, does not meet that burden.

exercise of discretion.' " (*Sheena K.*, *supra*, 40 Cal.4th at p. 889.) Therefore, this challenge does not present a pure question of law and Smith forfeited his challenge by failing to object below.

Smith references *People v. Bauer* (1989) 211 Cal.App.3d 937, which held a residency condition invalid because the only interest in appellant's residence came from a "suggestion that appellant's 'immaturity' may have resulted from his protective parents." (*Id.* at p. 944). Smith argues his case is similar because "there is nothing in the record to show that appellant's living conditions contributed to the crime of conviction." Smith's argument relies on an analysis of the facts of the case and fails to present a pure question of law, and as such only underscores that he forfeited his challenge here by not objecting below.

Smith also contends the condition allowing warrantless searches of his computer and electronic devices is unconstitutionally overbroad because it grants probation officers unfettered access to private, irrelevant information. Again, we conclude Smith forfeited his right to challenge this condition by failing to object in the trial court.

Smith relies on *Riley v. California* (2014) ___ U.S. ___ [134 S.Ct. 2473] for the proposition that a warrantless search of electronic devices is unconstitutional. However, *Riley* held a warrant is generally required to search a cell phone seized pursuant to an arrest, the holding does not apply to the constitutionality of probation conditions. (*Id.* at p. 2493.)

This court is not willing to say a warrantless electronics search condition is never appropriate. *In re R.S.* (2017) 11 Cal.App.5th 239, rejected a challenge that a warrantless

electronics search condition was unconstitutionally overbroad on its face. (*Id.* at p. 246). The challenge was rejected because the challenge did not present a pure question of law and thus was forfeited by failure to object below. (*Ibid.*) Similarly, *In re I.V.* (2017) 11 Cal.App.5th 249, held an overbreadth challenge to a probation condition allowing warrantless searches of property was not facially unconstitutional. (*Id.* at p. 255.) The analysis between the closeness of fit of the state interest between the constitutional burden would require an inquiry into the record to determine whether the condition was tailored to the state interests. (*Id.* at pp. 260-261). Further, we are aware that we should avoid adding to a constitutional issue pending before the California Supreme Court.³ (*California Teachers Assn. v. Board of Trustees* (1977) 70 Cal.App.3d 431, 442 ["Courts should follow a policy of judicial self-restraint and avoid unnecessary determination of constitutional issues."].) The condition allowing warrantless electronics searches is not unconstitutionally broad on its face. To analyze overbreadth further would require an analysis of the record. Such analysis is inconsistent with *Sheena K.*, *supra*, 40 Cal.4th 875, which restricts review to pure questions of law.

The probation conditions are not facially unconstitutional. Smith forfeited his right to challenge the conditions on appeal by failing to object below.

³ See, *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923; *In re Patrick F.* (2015) 242 Cal.App.4th 104, review granted Feb. 17, 2016, S231428; *In re Alejandro R.* (2015) 243 Cal.App.4th 556, review granted Mar. 9, 2016, S232240; *In re Mark C.* (2016) 244 Cal.App.4th 520, review granted Apr. 13, 2016, S232849; *In re A.S.* (2016) 245 Cal.App.4th 758, review granted May 25, 2016, S233932; *In re J.E.* (2016) 1 Cal.App.5th 795, review granted Oct. 12, 2016, S236628; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted Dec. 14, 2016, S238210.

DISPOSITION

The order is affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.